MAR. 1961

The Los Angeles BAR BULLETIN

VOL. 36 No. 5

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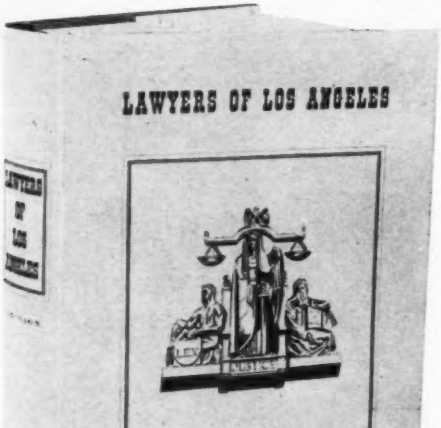

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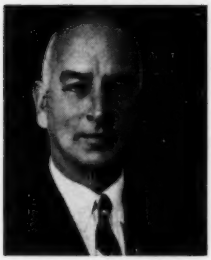
THE PRESIDENT'S PAGE



☆ ☆ ☆ ☆ ☆ ☆ ☆ ☆ A. STEVENS HALSTED, JR.

Whither Away?

» » RECENT EVENTS in our nation's Capitol have focused our attention on some of the confusions which accompany a change in administration—the forced or voluntary resignations of many dedicated and valuable public servants and a general turnover at the top levels of government. We are lucky that such drastic changes in leadership do not occur so suddenly in our Bar Association. While change is undoubtedly one of the elements of progress, ties with the past and strong continuity are certainly equally important in the functioning of an organization such as ours.

We have just completed an outstanding year in the work of our Association under the guidance of President Grant Cooper. He has been a dedicated and outstanding leader. Fortunately for the new Board of Trustees, he will continue to sit with us for another year to give the Board the benefit of his counsel and judgment. But six of our Trustees—Loyd Wright, Jr., Sharp Whitmore, George Harnagel, Jr., Burdette Boileau, James L. Potts and George W. Cohen—will no longer carry the heavy work load of the Board and participate in the almost day-to-day matters requiring careful attention. We shall miss their contributions and good fellowship. Fortunately for the Bar, we know they will continue to participate in our Association's activities and in the improvement in the administration of justice generally. With the election of six new Trustees who have already taken office, we have new faces to carry on the work. All too soon, however, another year will pass and once again we shall lose half of our Board, and so it goes.

Our fifty-odd standing and special committees, of course, contribute a binding influence and tie in with the past and preserve the traditions of our Association. So many of our members have devoted countless hours to Committee work over the years. Anyone close to the inner workings of the Association is always impressed with the tremendous contributions of these committee men and women to the service of the Bar and the Judiciary of the County. In this important field we shall also have new faces. For the last few years the Board of Trustees has followed a policy of rotation in committee membership, recognizing the importance of new ideas and the wisdom of spreading responsibility. To the extent practicable, members are not reappointed to a Committee following continous service of a maximum of three years; terms of members are staggered to accomplish both

continuity and rotation of membership.

So far, what I have said might give the impression that we are looking backward instead of to the future. Indeed, many of our members may identify me with the "Silver Memories" column carried a few years ago in the BAR BULLETIN covering events and personalities of a quarter-century ago. While deeply interested in the traditions of our community and profession, there is no deliberate aim on your President's part to tie to the past. Our present way of professional life presents challenges. Some of these can and should be dealt with presently.

What lies ahead for the coming year? With the help of our committees, the Board of Trustees and the membership, it is my hope that we may:

1. Strengthen existing ties with our 13 affiliated bar associations to the end that we can truly be a "County" association in every sense of the word.
2. Continue to grow in membership and better organize and utilize the talents and contributions of our members.
3. Strengthen our liaison with the Courts of this County to the end that we may further assist in the administration of justice.
4. Broaden the participation of our Association in the national activities of LAW DAY U.S.A. on May 1st.
5. Continue to push for club headquarters near the Courthouse—great strides have been made on this vital need during Grant Cooper's administration.
6. Foster the growth and development of new sections along the line of our Section on Taxation and the recently started sections on Probate and Trust Law and Corporate Law Departments.
7. Bring more services to our members in the form of new or broadened insurance programs and increased communication through the BAR BULLETIN.

These objectives represent goals toward which we can work with profit. Our Board will be able to provide strong leadership through which our Association may achieve these ends. We look forward with anticipation to the opportunity to participate in the sound growth of the Bar in our community.

THIS MONTH'S COVER

The drawing on the cover is by Honoré Daumier, and comes from his "Les Gens de Justice" series. This great 19th century French artist, caricaturist and social commentator was not always kind to the law and its practitioners, but he spent much of his drawing talent on these subjects, with the aim—shared by other social critics of his time—of causing improvements to come about by satirizing the then-current state of affairs.

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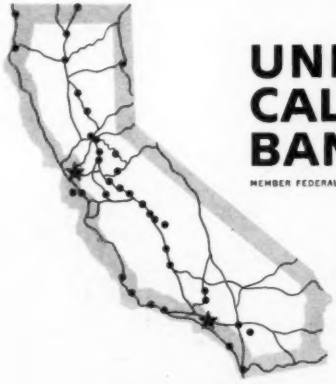

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Uniform Commercial Code Section 8=206: A Semantic Quagmire

By John R. Liebman
Third Year Student
U.C.L.A. Law School

Background

» » ARTICLE 8 OF THE Uniform Commercial Code regulates transactions in investment securities vesting them with the fully negotiable stature so long denied them.[1] Originally, the Uniform Stock Transfer Act (USTA) was drafted to accord investment securities the free circulability promoted by negotiable status. While it did not declare these securities to be negotiable instruments, USTA invested them with many of the attributes of negotiability.[2] Courts, however, were slow to perceive that the body of rules known as negotiable instruments law now fit investment securities as well.[3] For example, in California USTA was adopted in 1931,[4] yet it was not until 1948 that a California court was willing to concede that stock certificate transactions should be governed by Negotiable Instruments Law (NIL).[5]

Because of the judicial opposition encountered by USTA, it was decided to retire that statute and try a fresh approach.[6] Article 8 was added to the UCC to deal with the subject of investment securities formulating rules both meaningful and practical within the context of the investment securities market.[7]

Negotiability

Primarily, investment paper is to be made fully negotiable.[8] As a concomitant of negotiability, rules are needed to establish the rights of parties when a signed instrument containing blanks is completed or a completed instrument is altered. Section 8-206, the draftsmen's solution is, unfortunately, an inadequate solution.

Subsection (1) (a) thereof provides:

"Where a security contains the signatures necessary to its issue or transfer but is incomplete in any other respect any person may complete it by filling in the blanks as authorized . . ."

This is a restatement of both the

[1]Uniform Commercial Code § 8-105 (1) (1958 Official Text with comments) hereinafter cited as "UCC". Under the Uniform Negotiable Instruments Law (NIL), all securities (save a few classes of bonds) were denied negotiability, either because they did not contain a promise to pay money, were not negotiable on their face, or lacked some other basic prerequisite of negotiability. Bunn, *Article 8—A Law for the Transfer of Investment Securities*, 1952 *Wis. L. Rev.* 339; see also Annot., 52 A.L.R. 941, 947.

[2]*E.g.*, the Commissioner's Note to USTA § 11 states there is no reason why the implied warranties in the case of stock certificate sales should not be the same as in the case of negotiable paper under NIL § 66.

[3]See, *e.g.*, *Barthelmess v. Cavalier*, 2 Cal. App. 2d 477, 38 P.2d 484 (1934).

[4]*Calif. Civil Code* § 330, added by Stats. 1931, c. 862, p. 1793, § 2.

[5]*East Coalinga Oil Fields Co. v. Robinson*, 86 Cal. App. 2d 153, 194 P.2d 554 (1948).

[6]See UCC § 10-102 (1).

[7]Gilmore, *The Uniform Commercial Code; A Reply to Professor Beutel*, 61 *Yale L. J.* 364, 365 (1952): "The task of a statute like the Code is to state basic principles under which business transactions can be carried out."

[8]UCC § 8-105 (1).

BIOGRAPHICAL SKETCH OF JOHN R. LIEBMAN

John R. Liebman is in his final semester at UCLA School of Law, where he is president of the Law Students Association, chairman of the Federal Defender Program, and is a past marshal of McKenna Chapter of Phi Alpha Delta. He is a native of Chicago, Illinois, and received his B.A. from Dartmouth College in 1956.

common law and NIL rule that where a person executes a negotiable instrument containing blanks and delivers it to another, he has conferred either express or implied authority upon the holder to fill in the blanks as authorized.[9] The maker cannot be heard to complain if the party who ultimately seeks payment is a holder in due course.[10] The law of negotiable instruments goes on to say, however, that if the maker leaves blanks in the instrument, and does not deliver it, but it somehow falls into the hands of others by methods unknown, the instrument is unenforceable even if the ultimate holder can establish himself as a holder in due course.[11] The distinction is between "personal" defenses—good only against nonholders in due course—on the one hand, and "real" defenses—good against all the world—on the other.

This is not the pathway followed by Section 8-206 (1) (a). Because of the sustained criticism the distinction between real and personal defenses has received,[12] the draftsmen did not differentiate between delivered and undelivered securities.[13] If there are blanks, "any person may complete it by filling in the blanks as authorized." But in this simple statement there lies the first pitfall. Does the word "authorized" modify only the phrase "filling in blanks" or does it also modify "any person"? Seemingly, the draftsmen meant that if *anyone* completed the instrument within the bounds of the granted authority, the security was fully effectual and enforceable. However, it could be taken to mean that any person may complete it by filling in the blanks as *that person* was authorized to fill in the blanks.[14]

The question, then, is whether the issuer of an investment security can claim immunity when the instrument, though completed within the contemplated boundaries, is filled in by a party not expressly so empowered by the issuer and transferred to an in-

[9]NIL § 19: "Where the instrument is wanting in any material particular, the person, in possession thereof has a prima facie authority to complete it by filling up the blanks therein . . . In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given . . ."

[10]See NIL § 52.

[11]NIL § 17: "Where an incomplete instrument has not been delivered, it will not, if completed and negotiated without authority be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery."

[12]See 7 *Hastings L. J.* 11; UCC § 3-115, Comment 5.

[13]UCC § 8-206, Comment 1: "Non-delivery of an incomplete instrument is no longer available as a defense against a purchaser for value without notice."

[14]The validity of construing "authorized" as a modification of "any person" is buttressed by UCC § 3-115—the incomplete instruments section of the Negotiable Instruments article. That section, Article 3's corollary to § 8-206, does not refer to people filling in blanks but succinctly disposes of the problem in abstract terms: "When it (the instrument) is completed *in accordance with authority given* it is effective as completed." (Emphasis added.) A court construing § 3-115 with § 8-206 could legitimately conclude that the insertion of the words "any person" in § 8-206 was deliberately designed to bring the party completing the instrument within the authority requirement.

nocent purchaser. It cannot be assumed that there will never be an occasion when the issuer of the security will not want to disclaim liability despite proper completion. For instance, suppose the party to whom the issuer was obligated to deliver the security never received it; the issuer would remain liable on an existing obligation to the intended transferee, and would also be obligated under the instrument itself.

Where there is an improper transfer in incomplete form by the issuer's agent, the issuer would be estopped from raising any defenses against the innocent purchaser, even though the instrument had been completed by the "wrong" person, as it was the issuer's agent who consummated the fraud.[15] But where the instrument reaches an innocent person through an outright theft of an incomplete instrument, the prevailing rule holds that a purchaser takes whatever title his vendor had to convey, and that because a thief has no title at all his purchaser acquires no title.[16] A maker intent on defeating an investment security that has been completed by the wrong person and is in the hands of an innocent holder might argue that "any person" means "any authorized person," and since this instrument was not filled in by any authorized person—was in fact completed by a thief—the innocent holder has no title and cannot enforce the instrument. Yet it seems clear that such an argument should not succeed: it would destroy the underlying purpose of Article 8 by derogating the absolute negotiability of a properly completed security. It is submitted that this section should be redrafted to preclude the result outlined here from springing into reality.

Protection of the Purchaser

Subsection 1 (b) of Section 8-206 provides:

> "Where a security contains the signatures necessary to its issue or transfer but is incomplete in any other respect, even though the blanks are incorrectly filled in, the security as completed is enforceable by a purchaser who took it for value and without notice of such incorrectness."

This is an attempt to protect the purchaser for value when the issuer or transferor of a security leaves blanks later filled in contrary to instructions.[17] Basically, there are three situations in which this problem arises: first, a theft or embezzlement; second, an agent who mistakenly writes in $1000 where his principal said $100; finally, the agent who wilfully writes in $5000 where his principal said $500, pockets the difference and absconds. The draftsmen apparently intended to cover all three situations, yet the language leaves a gaping hole.

As already noted, subsection 1 (a) speaks of "authorized" completions of investment securities; subsection 1 (b), however, speaks not in terms of authority but in terms of correctness—the purchaser for value is protected against "incorrect" completions. The infrequent "well-meaning agent" situation is covered, but what of the more

[15] *Morgrage v. National Bank*, 24 Cal. App. 103, 140 Pac. 330 (1914); *Schumann-Heink & Co. v. United States National Bank*, 108 Cal. App. 223, 291 Pac. 684 (1930). *But see Kohn v. Sacramento Elec. Gas & Ry. Co.*, 168 Cal. 1, 141 Pac. 626 (1914).

[16] The leading case is *McNeil v. Tenth National Bank*, 46 N. Y. 325, 7 Am. Rep. 341 (1871); see also *White v. White*, 39 Cal. App. 2d 57, 102 P. 2d 432 (1940) (dictum). *But see East Coalinga Oil Fields Co. v. Robinson*, note 7, *supra*, *Reynolds v. Reynolds*, 180 A.C.A. 246 at p. 249, 4 Cal. Rptr. 464 (rev'd on other grounds, 7 Cal. Rptr. 737 [1960]).

[17] UCC § 8-206, Comment 3.

prevalent larceny examples? It is hard to bring deliberate peculation within the meaning of the word "incorrect," particularly when the preceding clause employs the word "authorized": "incorrect" means "erroneous" and "authorized" means "empowered."

If the language of subsection 1 (b) were accepted at face value, one would have to conclude that it fails to deal with the commonest form of security fraud—the unauthorized completion and sale of a signed instrument by one who is either entrusted with or has access to it. One is inexorably forced to conclude that although the draftsman used the word "incorrect" he actually meant "unauthorized."[18]

Further semantical difficulties are to be found in subsection 1 (b). The parties protected against an incorrect (or unauthorized?) completion are defined as "purchasers for value and without notice." Apparently, this eliminates the requirement of a good faith taking,[19] classically a prerequisite to full protection under the NIL.[20] Thus, a purchaser could seemingly take an investment security under circumstances which would lead any reasonable man to believe that it had been improperly completed, yet can enforce it for the full value stated so long as he gives value and does not have notice of the defect.[21] Proponents of the section may claim this to be a specious argument because the Code contemplates not actual but "constructive" notice,[22] thereby eliminating the need for a good faith requirement. If they are right, and there is every reason to believe they are, section 8-206 is left stranded somewhere between Scylla and Charybdis. For the draftsmen were undeniably striving to promote investment securities to negotiable stature, yet by eliminating the actual notice concept, the free circulability ensured by the NIL's actual notice requirement is precluded. The only plausible answer to this problem is that the Code now equates "good faith" with the absence of "constructive notice," whereas the NIL refused to do so. We submit, though, that these two concepts are not equivalents, that bad faith can thrive even on absent constructive notice, and that good faith should therefore be a prerequisite to protection.[23]

Effect of Alteration

Subsection 2 of Section 8-206 provides:

> "A complete security which has been improperly altered even though fraudulently remains enforceable but only according to its original terms."

The Commissioner's comment states that "An altered security may now be enforced according to its original terms by *any* holder. [Emphasis added.]" This comment embodies the rule of USTA Section 16[24] and rejects the rule of NIL Section 24.[25] The lan-

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[18]UCC § 3-115, the section dealing with incomplete negotiable instruments, uses the word "unauthorized" throughout. See note 16 *supra*.

[19]The omission, by accepted rules of statutory construction, should be deemed deliberate as the UCC does recognize the concept of the bona fide purchaser. See § 8-302, where the requirement of good faith is express. Furthermore, "good faith" is explicitly defined by the Code. See UCC § 1-201 (19).

[20]NIL § 52 (3); see also UCC § 3-302 (1) (b).

[21]See Britton, *Bills and Notes* § 112 (1943).

[22]UCC § 1-201 (25) (c).

[23]Under the NIL, a holder in due course was also required to take the instrument before maturity. The purchaser for value without notice concept does not need a pre-maturity taking requirement, as the problem is specifically covered by UCC § 8-203.

[24]USTA § 16: "The alteration of a certificate, whether fraudulent or not and by whomever made, shall not deprive the owner of his title to the certificate and the shares originally represented thereby, and the transfer of such a certificate shall convey to the transferee a good title to such certificate and to the shares originally represented thereby."

[25]NIL § 24: "Where a negotiable instrument is materially altered . . . it is avoided. . . . But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

guage of Subsection 2, however, does not specifically state that any holder can enforce the instrument, thereby creating a problem.

When the instrument has been materially altered by the party seeking enforcement, or one who took it knowing the change had been made, Equity's traditional maxim precluding relief for a litigant who comes to court with unclean hands,[26] obtains, and section 24 of the NIL is rigorously enforced.[27] To enable investment securities to circulate as freely as possible, USTA's Section 16 adopted the position that any holder, however culpable, could enforce a materially altered instrument according to its original tenor.[28]

Beyond question, the draftsman of section 8-206 (2) intended to adopt the rule of section 16 of the USTA—he says so in his comment. Yet subsection 2 seems to create a needless problem by using the words "improperly altered" in lieu of the standard "materially altered" phrasing found in the extant cases and statutes,[29] and in other parts of the UCC as well.[30] That the draftsman intended any substantive change seems doubtful. More likely, he envisaged "proper" alterations—for example, a minor clerical correction not affecting the substance of the instrument—and wished to establish that such alterations were not to affect enforceability. It is submitted that the "material alteration" concept is already so firmly embedded and so well defined by the decided cases that it would be helpful to employ it in this subsection.

Conclusion

In view of the semantical difficulties presented by the proposed version of Section 8-206, we tender our version of Section 8-206 for consideration.

"Section 8-206. Completion or Alteration of Instrument.

(1) Where a security contains the signatures necessary to its issue or transfer but is incomplete in any other *material* respect

(a) *it* may *be completed by a* filling in *of* the blanks *according to the authority given;* and (b) even though the blanks are *completed in an unauthorized or incorrect manner,* the security as completed is enforceable by a *good faith* purchaser who took it for value and without notice of *any* such *unauthorized or incorrect completion.*

(2) A Complete security which has been *materially* altered even though fraudulently remains enforceable *by any holder,* but only according to its original terms.

(3) As used in this section, a material alteration is any alteration which changes the writing as signed, by adding to it or removing any part of it."

(Italicized portions represent changes from this section as presently drafted; subsection (3), which is entirely new, is based upon UCC § 3-407 (1) (c).)

[26]See Annot., 22 A.L.R. 2d 14, 155-56.
[27]See, *e.g., Walsh v. Hunt,* 120 Cal. 46, 52 Pac. 115 (1898).
[28]See note 26 *supra.*
[29]See NIL § 125 and cases thereunder.
[30]*E.g.,* UCC § 3-407.

Legislative Powers of Administrative Authorities: The Rule of Law

the VIEW from the IVORY TOWER

By Norman Abrams

Acting Associate Professor
University of California School of Law
Los Angeles

[The International Commission of Jurists at the Hague, a non-political organization dedicated to the advancement of the Rule of Law throughout the world, recently circulated to national groups cooperating with it a questionnaire designed to elicit information on the practical operation of the Rule of Law in various countries. The cooperating body in the United States is the Committee to Cooperate with the International Commission of Jurists organized in 1955 by the Section of International and Comparative Law of the American Bar Association. Various local groups throughout the United States affiliated with this A.B.A. Committee were given the task of preparing draft answers to portions of the questionnaire which are to be integrated into a comprehensive statement of the operation of the Rule of Law in the United States.

Nine questions raising basic issues regarding the extent of and limitations on the "legislative" powers of administrative authorities in this country were assigned to a Los Angeles group under the chairmanship of Mr. Edward C. Freutel, Jr. In conjunction with the work of this group, the following summary statement was prepared by the author as the draft of a reply to these questions. It should be noted that the statement does not represent the final answer to the portion of the questionnaire assigned to the Los Angeles group. The author is indebted to members of this group and others for their comments and suggestions. He assumes sole responsibility, however, for what is contained herein.]

Introduction

» » THE PHRASE "administrative authority" as used in this paper includes the principal departments of the government, for example on the federal level, "State," "Defense," "Treasury," and "Interior," as well as commissions, boards, and agencies created by act of the legislature. Examples on the federal level of the latter are the Interstate Commerce Commission, Federal Communications Commission, Federal Trade Commission, and the National Labor Relations Board. Although "departments" of the former type are usually referred to as "executive" and the latter as "administrative," the terms "executive" and "administrative" are frequently used interchangeably in American legal terminology. More important, however, the same principles of administrative law apply generally to both types of administrative authorities.

Administrative authorities in the United States perform various functions. They promulgate rules and regulations in the manner of the legislature; like the courts they adjudicate disputes. They exercise rate-making

BIOGRAPHICAL SKETCH OF NORMAN ABRAMS

An acting associate professor at the UCLA School of Law, Norman Abrams has been instructing in the fields of administrative law, criminal law, and evidence on the local scene since 1959. For two years prior to that, he was a research associate at Harvard Law School. He was born in Chicago, Illinois, and is a member of the Illinois State Bar, having received his J.D. from the University of Chicago Law School in 1955.

and licensing powers and perform supervisory and investigative functions. Whether particular administrative action constitutes rule-making or the exercise of some other function such as adjudication may not always be clear. Various attempts have been made to define rule-making—for example, as administrative action "addressed to indicated but unnamed and unspecified persons and situations"[1]—but no single definition is entirely satisfactory. Yet the limitations imposed upon the powers of an administrative authority may turn on whether its action is more in the nature of legislating or adjudicating. In general the focus of the following discussion is on those administrative actions clearly legislative in nature. Where relevant, however, the problem of distinguishing between rulemaking and adjudication has been introduced. Except where otherwise indicated, statements made are generally applicable to both state and federal administrative authorities.

1. Delegation of Legislative Power

In general, an administrative authority cannot make legislative rules[2] unless the power to make rules has been expressly delegated. Such delegations are, in some instances, made by constitutional provision, particularly on the state level, but in most cases, the legislature, by statute, delegates power directly to the administrative authority or to the Executive who may in turn delegate the power. On the federal level, however, the President has been said to have an inherent power to deal with the international affairs of the nation, a power which is not dependent upon "the affirmative grants of the Constitution."[3] In the exercise of this power he may, for example, negotiate international executive agreements which have the force of law and are supreme over conflicting state laws.[4] The broad discretion involved in exercise of this power may well be unreviewable by the courts except insofar as it conflicts with "applicable provisions of the Constitution."[5]

In a limited sense, an administrative authority may possess "implied" power to issue rules. Rules promulgated under a statutory grant of rulemaking authority which does not in terms seem to cover rules of the type issued may be upheld where the reviewing court can, by looking to the purpose and framework of the enabling statute, find authority to issue such rules.[6] A rule based on such "implied" authority is subject to judicial review on the same general grounds and to the same extent as a rule authority to issue which is clearly granted.[7] (See infra No. 4.)

The "legislative" rules described in the previous paragraphs should be

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[1] Fuchs, Procedure in Administrative Rule-making, 52 Harv. L. Rev. 259, 265 (1938).

[2] The terms "rules" and "regulations" are used herein interchangeably.

[3] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

[4] *United States v. Belmont*, 301 U.S. 324 (1937).

[5] *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

[6] See *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). *Bank of Italy v. Johnson*, 20 Cal. 1, 251 P. 784 (1926); *California Drive-In Restaurant v. Clark*, 22 Cal. 2d 287, 140 P. 2d 657 (1943). Also compare sec. 11374, Calif. Govt. Code:

"Whenever by the *express or implied terms of any statute* a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." [italics added]

[7] It has also been suggested that administrative authorities have the power to promulgate binding rules governing their organization and procedures even in the absence of specific statutory authorization. See 1 Davis, Administrative Law Treatise §5.03 (1958). A broad power to control procedure is given the Executive Departments by 5 U.S.C. §22: "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it."

distinguished from so-called interpretative rules. The former represent an exercise of legislative power by an administrative authority and have the force of law. Even in the absence of any express constitutional or legislative authorization to issue rules, however, administrative authorities issue interpretative rules—i.e., interpretative statements issued as an incident of the administrating authority's power to implement and administer the provisions of a statute.[5] Such rules are not binding on the courts in the same sense as legislation enacted by the legislature or duly authorized legislative rules promulgated by an administrative authority (see infra No. 6); and thus it may be misleading also to term them "rules." Interpretative rules are often issued in the same formal manner as legislative rules, frequently with an appropriate *caveat* indicating that they do not have the force of law.

In a judicial proceeding in which an interpretative rule comes into issue, a court frequently will substitute its judgment as to the wisdom and desirability of the rule. Under certain circumstances, however, a court may give authoritative weight to such a rule—not on the ground that it is to be treated as legislation but rather because the administrative authority which issued it has special competence in the field, or the rule is of long standing, or the statutory provision interpreted by the rule was re-enacted while the rule was in effect.

2. Quantity of Delegated Legislation

Most administrative authorities have authority by statute to promulgate rules. Accurate figures comparing the "legislative" output of the executive branch with the quantum of legislation enacted by the legislature itself are not available, but there is no doubt that administrative legislative output far exceeds that of the legislature itself. On the federal level, for example, there is only one legislature, but estimates of the number of rule-making administrative authorities range as high as 155 (depending on the size of the units counted). As one very rough index of the disparity, it

[5]Examples of interpretative rules include most Treasury Regulations interpreting the tax laws and interpretative regulations and "bulletins" issued by the Administrator of the Fair Labor Standards Act. See *Wallace v. State Personnel Board*, 168 Cal. App. 2d 543, 336 P. 2d 223 (1959). Consult, Griswold, A Summary of the Regulations Problem, 54 Harv. L. Rev. 398 (1941); Morgenthau, Implied Regulatory Powers in Administrative Law, 28 Ia. L. Rev. 575 (1943).

may be noted that the Code of Federal Regulations takes up approximately nine feet on the library shelves while the codified statutes occupy but eighteen inches. On the state level, the difference in output may not be as great; undoubtedly it varies from state to state.[9]

3. Constitutional Limitations on Delegation

In general, there are no express restrictions in the constitutions, federal or state, on the power of the legislature to delegate legislative power to administrative authorities. Restrictions are imposed, however, based on the structure of the government and the language of the constitution. The principle of separation of powers of the three branches of government and the vesting by the constitution of all legislative power in the legislature provide the basis for the doctrine that the legislature cannot delegate its legislative power to an administrative authority. The impracticability, however, of imposing upon the legislature the task of legislating with respect to masses of detail, making constant use of technical and scientific data and keeping abreast of the shifting needs of an industrialized society induced the courts to permit a broadening of the legislative powers of administrative authorities. What was once a rather strict prohibition against the delegation of legislative power has, particularly on the federal level, been modified to permit relatively broad delegations of rule-making power—provided only that the scope of the power is not without limit and that "adequate" standards to guide the administrative authority are established by the legislature. The only two decisions[10] of the Supreme Court invalidating delegations on non-delegation grounds have not been overruled, but subsequent decisions[11] by the same Court indicate that the doctrine does not operate as a significant limitation on the power of the federal legislature to delegate rule-making authority. On the other hand, state courts with more frequency strike down delegations by state legislatures.[12]

The non-delegation issue on the federal level usually focuses on the adequacy of the standards limiting the granted rule-making power. Standards which have been upheld as adequate include many framed in very broad and general terms. Thus, for example, the standard limiting the Federal Communications Commission in the exercise of its extensive rule-making functions[13] is whether the "public convenience, interest, or necessity will be served thereby." Although such a broad standard may in a particular case derive considerable meaning from history and context, it may also result in a delegation to an administrative authority of considerable discretion.

One other perhaps theoretical aspect of the non-delegation doctrine should be mentioned. Were the legis-

[9]For a description of how to research administrative "legislation" in California, see Van Alstyne and Ezer, Legislative Research in California: the Uncharted Wilderness, 35 L.A. Bar Bull. 116, 145, 166 (1960).

[10]*Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A. L. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[11]*E.g., Lichter v. United States*, 334 U.S. 742 (1948); *Yakus v. United States*, 321 U.S. 414 (1944).

[12]*E.g., Van Riper v. Traffic Telephone Workers' Federation of N. J.*, 2 N. J. 335, 66 A.2d 616 (1949); *Bell Telephone Co. of Pa. v. Driscoll*, 343 Pa. 109, 21 A.2d 912 (1941); *Schaezlein v. Cabaniss*, 135 Cal. 466, 67 P. 755 (1902).

[13]The powers of the Federal Communications Commission over broadcasting include the power to classify radio stations; prescribe the nature of the service to be rendered; establish areas or zones to be served by any station; make special regulations applicable to radio stations engaged in chain broadcasting; regulate the keeping of station records; prescribe the qualifications of station operators; and designate call letters and require their publication. 47 U.S.C.A. §303.

lature to delegate an unusually broad and possibly unconstitutional rule-making authority to an administrative body the courts might be able to construe the grant narrowly to avoid the constitutional issue otherwise presented. The doctrine thus indirectly could result in the invalidation of administrative rule-making on *ultra vires* rather than non-delegation grounds.[14]

The legislature, of course, cannot delegate legislative power which it does not have. Any other constitutional restrictions on the legislature's power to legislate accordingly also restrict its power to delegate legislative power to an administrative authority.

4. Statutory Definition of Delegated Powers: Judicial Review

As indicated, the power to enact delegated legislation must be limited by adequate standards to guide the administrative authority; otherwise it may be held to be an unconstitutional delegation of legislative power. These standards—usually derived from the specific statutory language delegating authority or by looking to the entire statute—set out the legislatively defined policies which are to guide the administrative authority in its rule-making function. Within the broad limits permitted by the non-delegation doctrine, these policies may be defined by the legislature with varying degrees of precision depending on a variety of factors—including the confidence the legislature has in the particular administrative authority, the extent to which the subject matter lends itself to precise statement of objectives, and whether the legislature has at the time of the delegation clearly formulated its policies.

Two examples illustrate the range of possible variations in the precision and specificity with which such standards may be stated. Under the Renegotiation Act of 1942, Congress delegated to an administrative authority the power to recover "excessive" profits from government contractors without attempting in the statute to define what constitutes "excessive."[15] Two years later Congress incorporated into the authorizing statute a detailed statement of factors to be considered in determining excessive profits—factors which had been evolved by the administrator operating under the original delegation.[16] In perhaps a more extreme example, Congress, without incorporating into the authorizing statute any standards, delegated to the Federal Home Loan Bank Board broad powers to provide by regulation for the liquidation of savings and loan associations. The Supreme Court upheld this delegation, deriving the necessary standards from the "well-defined practices" of the banking industry.[17]

Delegated legislation which falls outside the scope of authority granted by the enabling statute may be set aside on this ground. The administrative authority itself may do so upon complaint of an aggrieved party in accordance with procedures provided

(continued on page 169)

[14]Compare *Kent v. Dulles*, 357 U.S. 116 (1958).

[15]This delegation was upheld in *Lichter v. United States*, 334 U.S. 742 (1948).

[16]"In determining excessive profits there shall be taken into consideration the following factors: (i) efficiency of contractor . . .; (ii) reasonableness of costs and profits, with particular regard to volume of production, normal pre-war earning and comparison of war and peacetime products; (iii) amount and source of public and private capital employed and net worth; (iv) extent of risk assumed, including the risk incident to reasonable pricing policies; (v) nature and extent of contribution to the war effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance; (vi) character of business, including complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over; (vii) such other factors the consideration of which the public interest and fair and equitable dealing may require . . . ." 58 Stat. 21, 79 (1944), 50 U.S.C. §1191 (1946).

[17]*Fahey v. Mallonee*, 332 U.S. 245 (1947).

LOS ANGELES COUNTY BAR ASSOCIATION INSTALLS NEW OFFICERS

Outgoing President Grant B. Cooper presents gavel to A. Stevens Halsted, Jr., newly elected Los Angeles County Bar Association President, at the Annual Meeting.

The Annual Meeting of the Los Angeles County Bar Association held on February 23, 1961, was the occasion for the installation of its newly elected officers and directors. Outgoing President Grant B. Cooper expressed his appreciation for the opportunity to have served the association for the past year and installed the incoming President A. Stevens Halsted, Jr. by presenting him with a gavel. In response Mr. Halsted praised the work of Mr. Cooper, despite the many demands made upon his time, and handed to him, in the name of the Association, a handsome placque expressing its esteem. After outlining the goals he had set for himself, Mr. Halsted then announced the newly chosen members of the Board of Trustees: Richards D. Barger, Robert M. Barton, James M. Hall, White McGee, Jr., Milford Springer, Gordon K. Wright, Donald Otto Krag as Trustee from the San Gabriel Valley Bar Association, and G. Bentley Ryan as Trustee from the Beverly Hills Bar Association; and the officers: Walter Ely, Senior Vice President, Maynard J. Toll, Junior Vice President, and Paul R. Hutchinson, Secretary. Frank C. Weller was reelected Treasurer. Other Trustees whose terms continue are A. R. Kimbrough, James M. Kindel, Jr.,

Edward S. Shattuck, Leslie C. Tupper, Irving P. Austin, and A. Hale Dinsmoor.

The meeting, which had as participants the members of U.S.C. Law School Alumni Association, then was challenged and entertained by Dr. Frank C. Baxter, Professor of English at U.S.C. Dr. Baxter, speaking on "The Complacent American" urged the United States to take stock for it has not achieved in accordance with its capabilities. He decried the shortcomings in education and in the practice of democracy and urged the professional man to keep his mind bright and alert, pointing out that as a learned man he kept on learning, never dropping the pack. He reminded the audience that such a man was fortunate above all men in that he got so much more than money for what he did.

Copies of All Patents Hidden

When the Alexandrian library, the most famous in all antiquity, was burned to the ground by the barbarians from the north, the learning of ancient Egypt went up in smoke! We don't know today how the Egyptians embalmed their dead, how the pyramids were built.

That will not happen to modern learning if the United States Patent Office (the greatest repository the world has ever known for mechanical, electrical, chemical and all other scientific fields) is obliterated by a hydrogen bomb. Three microfilm copies have been made of every one of the almost three million United States patents. Each of the two thousand applications for patent, filed every week in the United States Patent Office, is likewise thrice microfilmed. These three sets are deposited in three different, secret places in our country.

On billboards, bus posters, car cards and in many other media, Braille Institute urges, "See Your Attorney."

Section of Probate and Trust Law Organized

Organization of a Section of Probate and Trust Law of the Los Angeles County Bar Association, announced by Grant B. Cooper, past Association president, and Robert F. Schwarz, chairman of the Committee on Probate and Trust Law, has been completed. The first luncheon meeting was held on February 16, at the Biltmore Hotel.

In line with the intention to activate a stimulating program in this specialized field immediately, the February 16 program featured a talk by Walter A. Nossaman entitled "The Use and Drafting of Powers of Appointment." With a topic of such current interest to all attorneys who draft wills or trust agreements presented by an acknowledged expert in the field, the meeting was well attended; approximately 200 persons were present. Mr. Nossaman, in an entertaining and interesting fashion, discussed the nature of general and special powers, the dangers of the rule against perpetuities, problems in connection with conflicts of laws, and the various other problems presented to an attorney desirous of making use of a power of appointment. The session was conducted by Mr. Schwarz.

First suggested last spring, the Section of Probate and Trust Law follows the policy of the Board of Trustees to encourage formation of sections within the various specialized fields of practice. The first step was to change the former Committee on Probate Law and Procedure to the Committee on Probate and Trust Law with the inclusion of "all matters having to do with laws relative to trusts" within the committee's scope.

A survey of the need and desire for a section in this field was then undertaken by a subcommittee composed of W. S. McClanahan, chairman; Hugh L. Macneil, and Bruce G. McGregor. The study disclosed an active interest in the field of probate and trust law among a broad segment of the bar, including many attorneys in general practice as well as probate and trust law specialists.

Based on the study, the organization of a Section of Probate and Trust Law was recommended by the full committee and approved by the Board of Trustees.

The committee was charged with the planning, organization, and administration of the new section, with the committee officers serving as ex officio officers of the section.

According to present plans, luncheon meetings of the new section will be held four or five times a year, on the third Thursday of the months selected. The next two meetings are scheduled for April 20 and July 20. These meetings will be addressed by outstanding speakers on topics of interest in the various phases of probate and trust law, with emphasis upon material of practical value to those who practice in these fields.

Further announcement of Probate and Trust Law Section meetings will be made in future issues of the BULLETIN, as well as by an enclosure in the announcement of the Association's monthly meetings in the months preceding the section meetings. Members who desire to be placed on the mailing list of the new section, in order to receive notice of its meetings, are urged to write to the Bar Association.

notes from your Law Library

by JOHN W. HECKEL • Head Reference Librarian, Los Angeles County Law Library

ADVOCACY: *Advocacy and the King's English* edited by George Rossman, Associate Justice of the Supreme Court of Oregon (Bobbs-Merrill, 976 p.) is a collection of law review articles and excerpts from books on handling trials, appeals and oral argument as they require the use of English. Judicial opinions and the ethics of advocacy are also treated.

BIOGRAPHY: *Andrew Johnson: President on Trial* by Milton Lomask (Farrar, Straus and Cudahy, 376 p.) is a narrative account, without documentation, of the only impeachment trial involving a president. The financial difficulties of another president are revealed in detail for the first time in *James Monroe, Public Claimant* by L. Wilmerding Jr. (Rutgers, 144 p.)

CALIFORNIA POLITICS: *The Politics of Nonpartisanship: A Study of California City Elections* by E. C. Lee (University of California Press, 232 p.) describes the local election process, pressure groups, and the kinds of persons who engage in campaigning. The historical background as well as current conditions are discussed.

CONGRESSIONAL INVESTIGATIONS: *Libel in News of Congressional Investigating Committees* by Harold L. Nelson (University of Minnesota Press, 174 p.) deals with the qualified privilege which renders the press immune to prosecution under libel laws when reporting the activities of legislative investigating committees. The study is devoted mainly to the House Committee on Un-American Activities; its public files, reports, and subcommittees.

CONSTITUTIONAL LAW: *Major Problems in State Constitutional Revision*, edited by W. B. Graves (Public Administration Service, 306 p.) points out the pressing need for revision of state constitutions. Attention is focused on defining a good constitution and what should be included. *Powers of the President During Crises* by Smith and Cotter (Public Affairs Press, 184 p.) deals with emergency periods and the resulting control of persons, property and communications. The major portion of the book is devoted to the period from World War II through the Steel Seizure cases.

CORPORATIONS: The American Bar Association's *Model Business Corporation Act* (West, 3 v.) contains case citations and a bibliography on the business corporation laws of all the states, the District of Columbia and Puerto Rico as a background for the Model Act. The text appears in v. 3 with forms and another bibliography. J. F. Spoerri directed the project.

LIBEL AND SLANDER: A new edition of Gatley on *Libel and Slander* (Sweet & Maxwell, 820 p.) has been written by Richard O'Sullivan with a foreword by Sir Patrick Devlin. The whole common law is treated with emphasis on English cases. A good proportion of decisions from American courts are also cited.

PRODUCTS LIABILITY: *Allergy and Products Liability* by Warren Freedman (Central, looseleaf) discusses the law relating to products liability in general and allergies in particular. The nature and medical aspects, non-forceability of allergic reactions, government supervision and labeling are treated.

PSYCHOLOGY: *Psychology and the Law* by D. G. McCarty (Prentice-Hall, 463 p.) related the conclusions of an experienced attorney on the use of psychological understanding of human motivation and interpersonal relationships in legal work. Many diverse topics are covered: how to get facts clients withhold, meeting opposing counsel, responsibility, the legal process, obtaining evidence, and the judge.

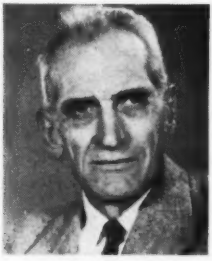
SUPREME COURT: *Justices Black and Frankfurter: Conflict in the Court* by Wallace Mendelson (University of Chicago Press, 151 p.) uses the different approach of two justices, one an idealist and one a realist, to point out conflicts in determining the role of the judge and the Supreme Court in the American legal system.

TAXATION: *The Foreign Tax Credit* by E. A. Owens (Harvard, 634 p.) is another in the series published for the International Program in Taxation at Harvard Law School. The current study examines the important problem of credit for taxes paid in foreign countries under United States income tax law. The credit is important in developing American trade and investment abroad. Chapters are devoted to the rules, qualifications, indirect credit limitations, determination of year taken, who is entitled, and the conversion of foreign creditable taxes into United States dollars. A bibliography, index and an appendix on recent developments complete the work.

news from the

AFFILIATED BAR ASSOCIATIONS

In addition to the Affiliated Bar Associations whose new officers were announced last month the following have also held their installation ceremonies: Compton Judicial District Bar Association, which will be led this year by Roger J. Pryor, President, assisted by Ralph A. Biggerstaff, Vice President, Edmund J. Russ, Treasurer, and John Tretheway, Secretary; San Fernando Valley Bar Association



Paul Roest

whose officers for 1961 are Paul Roest, President, Philip F. Jones, Vice President, Jack B. Clark, Treasurer, and I. Stephen Brent, Secretary; South Bay District Bar Association, to be guided by Lowell L. Dryden, President, Eric Rafter, First Vice President, Charles F. Catterlin, Second Vice President, Raymond Winters, Treasurer, and Frank Hillsinger, Secretary; and the Whittier Bar Association under the leadership of Earl F. Riley, President, Herbert J. Adden, Jr., First Vice President, Robert E. Atkinson, Second Vice President, Russell A. Holt, Treasurer, and Fred A. Swide, Secretary.

BAR ACTIVITIES *Calendar*

Los Angeles County Bar Association

Committees

March 14—Federal Rules and Practice, 12:30 p.m.

Junior Barristers

March 17 – Monthly luncheon meeting, University Club, 12 noon.

General Monthly Meeting

March 23—Biltmore Bowl, 12 noon. Speaker, Mr. Whitney North Seymour, President, American Bar Association. Topic: "The Public Stake in an Independent Bar."

Affiliated Associations

March 18-19—Beverly Hills Bar Association, Golf Tournament, Ranch Club Golf Club, Palm Springs.

State Bar of California

September 25 to 29—Thirty-third annual meeting, Monterey.

American Bar Association

August 7 to 13—Annual Meeting, Chase-Park Plaza Hotels, St. Louis, Mo.

(Official announcements concerning events of interest to members of the Los Angeles County Bar Association will be included in the Calendar as space permits. The deadline for submission of dates is the 20th of the prior month. Please send information to the Office of the Bar Association.)

for by its own rules or by statute. If the administrative authority determines that the rule promulgated was within the scope of its authority, the aggrieved party may obtain judicial review of this determination, generally, however, only after exhausting his administrative remedies.[18] To qualify as a party aggrieved, the person complaining must be injured in some legal interest[19] or must fall within a class granted by statute the right to obtain judicial review.[20] Prior to an attempt by the administrator to enforce the rule, there may be a question whether a person upon whom the rule has already had some prejudicial impact can obtain review. The trend of judicial decisions would seem to indicate that review will often be obtainable even prior to attempted enforcement.[21]

Judicial review of an administrative regulation may take the form of direct review in an appellate court based upon a specific or general statutory provision; or it may be had collaterally in a court of original jurisdiction —for example, in an action brought to enforce a regulation; in an injunction suit to enjoin its enforcement; in a declaratory judgment proceeding; by use of one of the extraordinary writs such as mandamus;[22] or in a habeas corpus proceeding to obtain release from an arrest for violation. The legislature may by statute make a particular method or methods of review exclusive.[23] If the reviewing court finds that the agency determination was erroneous, i.e., that the rule promulgated was beyond the scope of its delegated powers it will, depending on the form of review involved, issue an order the effect of which will be to invalidate the rule.

Again it should be noted that in determining whether an administrative regulation is within the scope of the enabling statute, a reviewing court may be influenced by possible constitutional infirmities of the regulation. The Supreme Court has in a number of recent cases indicated that, at least in areas affecting liberties of the individual, where an administrative authority promulgates a rule which is constitutionally doubtful and which can be held to be outside the scope of its delegated powers by a restrictive interpretation of the authorizing language, the Court may interpret the legislative grant narrowly and invalidate the rule on *ultra vires* grounds.[24] Thus, for example, the Court has stated: "Where activities or enjoyment, natural and often necessary to the well-being of an American citizen,

[18]See *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938). *Walker v. Munro*, 178 Cal. App. 2d 67, 2 Cal. Rptr. 737 (1960). *Cf. Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954); *Charles L. Harney, Inc. v. Contractors' State License Board*, 39 Cal. 2d 561, 247 P. 2d 913 (1952).

[19]*Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

[20]*Associated Industries of New York State v. Ickes*, 134 F.2d 694 (2d Cir. 1943); *Charles L. Harney, Inc. v. Contractors' State License Board*, 39 Cal. 2d 561, 247 P. 2d 913 (1952).

[21]See *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407 (1942); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). *Charles L. Harney, Inc. v. Contractors' State License Board*, 39 Cal. 2d 561, 247 P. 2d 913 (1952). But compare *Eccles v. Peoples Bank*, 333 U.S. 426 (1947).

[22]Historically the writs of certiorari and prohibition were only available to review or prevent judicial or quasi-judicial action. For discussion of the California complexities in this area, consult McGovney, Administrative Decisions and Court Review Thereof in California 29 Cal. L. Rev. 110 (1941). Kleps, Certiorarified Mandamus 2 Stan. L. Rev. 285 (1950).

[23]See, *e.g.*, *Yakus v. United States*, 321 U.S. 414 (1944).

[24]*E.g.*, *Greene v. McElroy*, 360 U.S. 474 (1959); *Peters v. Hobby*, 349 U.S. 331 (1955). Also compare *F.C.C. v. American Broadcasting Co.*, 347 U.S. 284 (1954).

such as travel are involved, we will construe narrowly all delegated powers that curtail or dilute them."[25]

Finally it should be mentioned that, as a practical matter, judicial review may not always be a wholly effective means of overturning improper exercise of delegated legislative power. Where the delay incidental to litigation in itself would destroy any advantage to be gained by setting aside the administrative action, or where the individual interest affected is not sufficiently important to justify the expense of litigation, an injured party may prefer to comply with an *ultra vires* requirement rather than seek his judicial remedy.

5. Procedural Requirements

Procedures followed in the enactment of delegated legislation may be established by a specific enabling statute; by the administrative authority itself in exercise of its rule-making functions; by the custom and practice of the particular administrative authority; or by a general statute prescribing procedures for the exercise of administrative functions.

Procedures provided for by specific statutes, administrative regulations and practice vary considerably from agency to agency. It has been suggested that factors which may influence the procedures chosen include: the character and number of parties affected; the nature of the problems dealt with; the character of the administrative determination; the type of administrative agencies involved; and the character of enforcement attached to the rule involved.[26] Depending on such factors, there may be no provision for participation by affected parties; or affected parties may participate through consultation, conferences, written presentations or oral hearings.[27] In general, there is no constitutional requirement that rule-making be preceded by an oral hearing and findings,[28] but there have been occasional decisions indicating that in connection with the performance of some administrative functions which at least resemble rule-making—e.g., wage-fixing—some such procedural safeguards may be required.[29] Where a specific statute requires "a hearing" in connection with rule-making, it may be interpreted merely to permit the oral presentation of evidence and argument by interested parties; or to require a trial-type proceeding with testimony under oath, opportunity for cross-examination and refutation, and findings based upon the record.[30] In general, whether a trial-type hearing is required depends on whether elements of adjudication are sufficiently present in the "rule-making" function.[31]

On the federal level and in many states, general statutes provide certain minimal procedural standards which, in the absence of specific statutory or administrative provision, are generally applicable to most administrative authorities. Thus, on the federal level, the Administrative Procedure Act (APA) requires that notice of pro-

[25] *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

[26] Fuchs, Procedure in Administrative Rule-Making, 52 Harv. L. Rev. 259 (1938).

[27] See generally Administrative Procedure in Government Agencies, Report of Attorney General's Committee on Administrative Procedure 101 *et seq.* (1941).

[28] See *Ray v. Parker*, 15 Cal. 2d 275, 101 P. 2d 665 (1940).

[29] See, *e.g.*, *McGrew v. Industrial Commission*, 96 Utah 203, 85 P. 2d 608 (1938); *Western Union Telegraph Co. v. Industrial Commission of Minnesota*, 24 F. Supp. 370 (D. Minn. 1938); *People v. Johnson*, 42 Cal. App. 2d (Supp.) 827, 109 P. 2d 770 (1941). Consult Fuchs, Constitutional Implications of the Opp Cotton Mills case with Respect to Procedure and Judicial Review in Administrative Rule-making, 27 Wash. U.L.Q. 1 (1941).

[30] See, *e.g.*, *Pennsylvania R. Co. v. Department of Public Utilities*, 14 N.J. 411, 102 A.2d 618 (1954).

[31] Consult 1 Davis, Administrative Law Treatise §7.07.

posed rule-making be published, that interested persons be afforded an opportunity to submit written data and arguments with or without opportunity to present the same orally, and that the rules adopted contain a statement of their basis and purpose.[32] Even these minimum requirements of the APA may be dispensed with when the administrative authority for good cause finds that these procedures are "impracticable, unnecessary, or contrary to the public interest."[33] Rules excepted from these requirements are also listed, viz., interpretative rules, general statements of policy and rules of agency organization, procedure or practice. If a particular enabling statute provides that rules are to be made on the record after opportunity for agency hearing, the APA also provides the details of the procedures to be followed.

The most common, generally-applicable provisions on the state level include notice and opportunity to submit data and views orally or in writing.[34] A few states have general statutes which impose more stringent procedural requirements including, for example, public hearings.[35] Again, under such provisions a trial-type hearing and its incidents may or may not be required.

Failure to comply with procedures required by law for enactment of administrative rules may be a ground for setting them aside. Where, for ex-

[32] §4(a)(b), Federal Administrative Procedure Act.

[33] See, *e.g.*, In the Matter of Reallocation of Certain Frequency Bands, 8 P & F.2d 385 (F.C.C., 1958).

[34] Model State Administrative Procedure Act §2 (3). Section 11423, Calif. Govt. Code, requires notice of proposed rule-making to be published at least 30 days prior to taking action. Section 11425, Calif. Govt. Code provides that "any interested person" shall have "the opportunity to present statements . . . in writing, with or without opportunity to present the same orally." State agencies are also given authority by this section to administer oaths or affirmations.

[35] *E.g.*, Ohio R. C. §119.03.

ample, the type of hearing required by statute, administrative provision[36] or constitution has not been held, the rules promulgated may be invalidated.[37] Not every disregard, however, of a procedural requirement will be a ground for invalidation; in general, the violation must be "substantial and prejudicial" to the party complaining.[38]

Requirements for setting aside an administrative rule for failure to comply with necessary procedures are the same as those applicable to cases where the complaint is that the rule is *ultra vires* the enabling statute. The party complaining must be aggrieved and must first exhaust his administrative remedies; the issue may be raised in any of several contexts the nature of which will determine the type of court which will consider the issue.

It should be noted that even though procedures required to be followed in promulgating rules are minimal, the technique of rule-making itself ordinarily assures to interested persons the advantage of some advance notice of new administrative policies. Development of new policy in individual adjudicatory proceedings, on the other hand, may result in surprise to affected parties, particularly where the development was not foreshadowed by prior administrative action and involves interpretation of a broad statutory standard. Many administrative authorities are authorized to act both by rule-making and through case-by-case interpretation of appli-

[36]Failure to comply with procedures required only by agency practice may be a ground for setting aside promulgated rules. *Sangamon Valley Television Corp. v. United States*, 269 F. 2d 221 (D.C. Cir., 1959).

[37]*E.g., Colteryahn Sanitary Dairy v. Milk Control Commission*, 332 Pa. 15, 1 A.2d 775 (1938).

[38]*Sangamon Valley Television Corp. v. United States*, 269 F. 2d 221 (D.C. Cir., 1959) (alternative ground). *Cf. Courtaulds (Alabama) Inc. v. Kintner*, 182 F. Supp. 207 (D.D.C. 1960). Sec. 11440, Calif. Govt. Code provides that regulations may be declared to be invalid for a "substantial failure" to comply with required procedures.

cable statutory standards. In general, there is no constitutional compulsion to use the one approach or the other, and even the fact that the case-by-case approach results in retroactive application of new policy may not be a sufficient reason to invalidate administrative action.[39] Although the rule-making approach should be followed "as much as possible, . . . any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise."[40] The choice of which procedure to follow is one which "lies primarily in the informed discretion"[41] of the administrative authority. Factors which may be considered in exercising this discretion include, for example, whether the problem is of a type which can be handled within the confines of a general rule; whether the administrative authority yet has adequate information and experience to warrant issuance of a rule; and whether the problem was foreseeable before it arose in a particular case.[42]

6. Scope of Judicial Review: Exclusion of Review

In the absence of special legislation, the scope of review usually applied by a reviewing court in determining the validity of a legislative rule promulgated by an administrative authority is limited primarily to a determination that it is: a) constitutional—viz., issued pursuant to a valid delegation of legislative power and not in violation of constitutional rights; b) within the scope of the delegated authority; and c) issued in accordance with proper procedures.[43] In general, the courts do not attempt, unless a specific statute so provides, to re-evaluate the facts underlying the administrative determination, the soundness of the reasoning by which the rule was arrived at, or to substitute their judgment as to what the rule should be.[44] Judicial review of the validity of administrative rules is thus, in general, initially limited in scope.

The extent to which even this limited judicial review of administrative regulations can be precluded by legislative enactment is unclear under our law. The issue of preclusion may arise in a number of different statutory contexts. The relevant statute may be silent on the issue of whether review is available;[45] somewhat ambiguously, it may provide that the administrative decisions are to be "final";[46] or it may expressly provide that agency determinations "shall not be reviewed or redetermined by any court,"[47] or "no . . . court shall have jurisdiction" to review "decisions . . . on any question of law or fact . . . under any law" administered by the agency.[48]

Such language of preclusion, although perhaps clearly barring review

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[39] *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194 (1947); *Leedom v. International Brotherhood of Electrical Workers, Local 108*, 278 F. 2d 237 (D.C. Cir., 1960). *Cf. National Labor Relations Board v. Guy F. Atkinson Co.*, 195 F. 2d 141 (9th Cir., 1952).

[40] *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 202 (1947).

[41] *Ibid.* at 203.

[42] See generally Baker, Policy by Rule or Ad Hoc Approach—Which Should It Be? 22 L. & Contemp. Prob. 658 (1957).

[43] Some cases also impose an additional requirement that the regulation must be "reasonable." See, *e.g.*, *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129 (1936). See also Sec. 11374, Calif. Govt. Code, *supra* Note 6; *Knudsen Creamery v. Brock*, 37 Cal. 2d 485, 234 P. 2d 26 (1951).

[44] See *Pacific States Box and Basket Co. v. White*, 296 U.S. 176 (1935).

[45] See *Switchmen's Union of North America v. National Mediation Board*, 320 U.S. 297 (1943).

[46] *E.g.*, Universal Military Training and Service Act of 1951, 50 U.S.C.A. App. §456.

[47] *E.g.*, Renegotiation Act of 1951, 50 U.S.C.A. App. §1218(b).

[48] *E.g.*, Veterans' Benefits Act of 1957, 71 Stat. 83, 38 U.S.C.A. §211.

of adjudicative decisions interpreting and applying regulations to particular facts may not be as clear in prohibiting judicial consideration of the validity of regulations under which the administrator acts. Some courts, at least, under such exclusionary language have determined the validity of the regulations under which action was taken although declining to review further.[49]

Moreover, even with respect to administrative determinations to which language of preclusion clearly applies, the courts, as a matter of statutory interpretation, frequently read language apparently cutting off all review as permitting, at the very least, review of whether the administrative action violates constitutional rights or is clearly outside the statutory jurisdiction of the agency.[50] The minimum amount of review frequently permitted under clear language of preclusion thus may not differ materially from the amount of review ordinarily applied in determining the validity of delegated legislation. As a practical matter therefore, attempts by the legislature generally to limit review of administrative action may not be effective to limit the scope of review of delegated legislation which otherwise obtains. Because of judicial techniques of statutory interpretation and the unlikelihood that the legislature will press the issue, the ultimate question of whether the legislature could, consistent with the constitution, bar any and all judicial review of administrative action has not and probably will not be posed.

The legislature may delegate to an administrative authority rule-making power in terms which seem to call for a subjective decision on the part of the administrator. Such a delegation again must first survive the objection that it constitutes a delegation of legislative power in violation of the constitution. As suggested above, however, a statement of adequate standards will probably make the delegation impregnable to constitutional attack. Apart from questions of constitutionality, it is difficult to generalize as to the effect of such statutory language on the reviewability of administrative action under it. It may, for example, preclude judicial inquiry into facts underlying the administrative action. Thus in the following terms the Supreme Court has held the President's adjustment, upon recommendation of the Tariff Commission, of import duties unreviewable. "It has long been held that where Congress has authorized a public officer to take some specified legislative action when *in his judgment* that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of facts calling for that action is not subject to review"[51] (italics added). On the other hand, despite such language of discretion the courts will probably still review administrative action to prevent serious abuse of discretion.[52] In sum, language of discretion does not make the issue of reviewability any clearer than language expressly forbidding review.

There is little doubt that judicial decisions on the reviewability of grants of power framed in discretionary terms have had little effect on legislative use of such language and that

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[49]*Barnett v. Hines*, 105 F. 2d 96 (D.C. Cir., 1939); *Slocumb v. Gray*, 179 F. 2d 31 (D.C. Cir., 1949).

[50]See generally 4 Davis, Administrative Law Treatise, §§28.12-28.15; Jaffe, The Right to Judicial Review, 71 Har. L. Rev. 401, 769 (1958).

[51]*United States v. George S. Bush & Co.*, 310 U.S. 371 (1940).

[52]See 4 Davis, Administrative Law Treatise §28.16.

this form of words continues to be used by the legislature with the same uncertain results.

7-9. Delegated Powers: Public Emergency

There are few constitutional provisions dealing with the effect of a public emergency on the exercise of governmental powers. Article I, § 9 of the Federal Constitution does provide that "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public Safety may require it." And the Fifth Amendment indicates that the right to indictment by a grand jury of a person serving in the Militia in time of war or public danger may be suspended. In addition, of course, Congress has the power "to declare War" and to "make all Laws which shall be necessary and proper for carrying into Execution . . . (its enumerated) Powers, and all other Powers vested by (the) . . . Constitution in the Government of the United States, or in any Department or Officer thereof." And the President, the holder of the "executive Power," is to "take Care that the Laws be faithfully executed," and is designated "Commander in Chief of the Army and Navy." Claims of authority in time of emergency to take action otherwise not permissible usually are related to one or more of these provisions.

Congressional legislation delegating emergency powers to the executive sometimes itself declares the existence of the state of emergency; sometimes other Congressional declarations to this effect are relied upon; finally, some statutes expressly or impliedly delegate to an executive agency—usually the President himself—the task of determining whether the

required emergency exists. Thus, emergency powers have been by statute determined to be exercisable "when in . . . (the President's) judgment the public safety may require it," or "in time of war or when war is imminent" or when the President proclaims that there exists a "state of public peril or disaster or other national emergency."[53]

There have been numerous instances in time of public emergency where a broad power to enact delegated legislation has been delegated by Congress to the executive. An outstanding example of this type of statute was the Emergency Price Control Act of 1942 which delegated to an administrative authority the power to fix prices. Section 1 (a) of the Act declared that it was "in the interest of national defense and necessary to the effective prosecution of the . . . war." Congress has with some frequency delegated to the executive even more extreme emergency powers. Numerous statutes have delegated to the President the power in times of emergency to seize various types of property and operate businesses for limited periods or during the continuance of a defined emergency. Usually detailed conditions precedent to the exercise of the power are imposed, and uniformly there is provision for the payment of just compensation to the property owner. Such congressional grants of power have been uniformly upheld as being within the legislative power.[54]

Where the Congress itself has by statute or resolution determined that a public emergency exists which justifies extreme legislative measures which in the absence of the emergency might be unconstitutional the courts usually defer to the legislative determination. Similarly, the courts usually defer to a legislatively authorized determination by the executive that an emergency exists.[55] The judiciary, however, may invalidate executive action attempted to be justified under a claim of emergency which substantially impairs constitutional rights and is not shown to be clearly justified by the claimed emergency conditions.[56]

The extent of the autonomous power of the executive to legislate in time of public emergency depends on whether one looks at the practices of various Presidents in times of crisis or at the judicial pronouncements on the subject. Presidents, in time of war or when war has been imminent, in the absence of enabling legislation have taken numerous extreme actions including the seizure of property. Congress almost uniformly has given subsequent support to such executive acts, frequently by express legislative provision.[57]

The question of the constitutionality of such autonomous executive action has rarely been faced by the Supreme Court. It has usually been difficult for injured persons to obtain timely judicial review of such actions. In the most recent leading de-

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[53]See authorities collected *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (concurring opinion).

[54]*Ibid.*

[55]*Cf. Korematsu v. United States*, 323 U.S. 214 (1944).

[56]See *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), particularly Mr. Chief Justice Stone concurring at p. 335; Ex parte Milligan, 4 Wall. 2 (1866). *Cf. Sterling v. Constantin*, 287 U.S. 378 (1932). See also *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924). Sec. 11440, Calif. Govt. Code provides, inter alia, that an emergency regulation may be declared invalid "on the ground that the facts recited . . . do not constitute an emergency."

[57]See Chief Justice Vinson dissenting in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 667, 683 (1952).

cision relating to the question, however, *Youngstown Sheet and Tube Co. v. Sawyer*,[58] a majority of the Supreme Court ruled that where Congress, in enacting legislation dealing with labor conflicts, had deliberately refused to grant to the Executive a seizure power, the President had no power to seize the nation's steel mills to avert the "national catastrophe" which would be caused by an impending strike of steel workers.[59] Whether future Presidents would feel bound by this decision in the face of a *serious* public emergency may be questioned, however, particularly in view of the history of autonomous executive action in time of emergency.[60]

In general, in time of public emergency the legislature tends to delegate powers in broader terms,[61] and the courts probably exhibit a looser attitude in interpreting delegated legislation. Congress has the power "to make all Laws which shall be necessary and proper for carrying into Execution (its) . . . Powers," and the concept of what is "necessary and proper" under the exigencies of wartime or other national emergency is considerably broadened. Thus, although in theory delegated legislation enacted in time of and related to a public emergency may be set aside either because beyond the scope of the enabling law or because required procedures[62] are not followed in the enactment process, the courts are probably less likely to do so during time of emergency. Similarly the courts are probably quicker to uphold statutory language excluding, limiting, or providing particular methods of review where ordinary judicial review would interfere with necessary emergency measures.[63]

In considering the law applicable to executive action in time of public emergency, it should be kept in mind that this is a relatively uncharted area in American law. There are some decisions, but they do not necessarily furnish controlling precedents. Moreover, although there may, in theory, be basic constitutional limitations on executive action—for example, on autonomous legislative power—and such action may be theoretically subject to judicial review, in time of real emergency, the only effective limitation on the exercise of such powers would seem to be the good judgment of the Executive himself and the not inconsiderable power of public opinion.

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[58]343 U.S. 579 (1952).

[59]The scope of the holding of the case is not entirely clear. Mr. Justice Black wrote the Opinion of the Court in which he mentioned but did not particularly rely upon the congressional refusal to grant the power in question. Justices Frankfurter, Jackson, Clark and Burton wrote separate concurring opinions in which they relied on the congressional refusal; Mr. Justice Douglas also concurred separately in an opinion which did not mention the refusal.

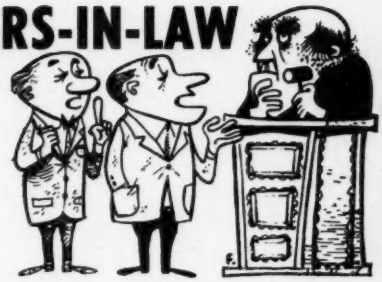
[60]See generally Rossiter, The Supreme Court and the Commander in chief (1951); Schubert, The Presidency in the Courts (1957); Corwin, The President, Office and Powers (1948).

[61]The broad standards which limited the rule-making power under the Emergency Price Control Act of 1942 were held adequate to satisfy the non-delegation doctrine in *Yakus v. United States*, 321 U.S. 414 (1944). Although there have been suggestions to the contrary, (see, for example, Justice Roberts dissenting at p. 460) it is not clear that the Court relied particularly upon the war emergency to uphold the broad delegation involved there.

[62]Compare Calif. Govt. Code §11421(b) which provides that the usual procedures do not apply to emergency regulations where "the state agency makes a finding, including a statement of facts constituting the emergency in writing that the adoption of a regulation . . . is necessary for the immediate preservation of the public peace, health and safety or general welfare . . . ." Such emergency regulations may not remain in effect more than 120 days unless the agency meanwhile complies with the usual procedures, §11422.1.

[63]See *Yakus v. United States*, 321 U.S. 414, 431 *et seq.* (1944).

BROTHERS-IN-LAW



By
GEORGE
HARNAGEL, JR.

THE CHANGING OF THE GUARD

» » THE FEBRUARY MEETING of our Association witnessed, as it always does, the retirement of one president, the installation of a new president, and the upward progression of other members of our official family.

Grant Cooper came to the presidency of our Association after an able tour of duty on the Board of Governors of the State Bar and he leaves it with the warm regard and deep-seated respect of all those who served under his leadership.

We doubt if any of our presidents had a more pressing professional and personal calendar than did Grant during the period of his administration. It began during the first Finch trial, continued through the whole of the second Finch trial, and ended shortly after the Supreme Court had vindicated his courageous conduct in that case by annulling the contempt judgment against him. In addition, he handled other litigation of consequence and, on the strictly personal side, was in and out of the hospital and subjected to various explorations, excursions and excisions by the medical and dental professions. Yet he never forgot or neglected his obligations as the Association's chief executive and missed but one out of twenty-six meetings of the board of trustees,[1] a record which Stanley Johnson, our executive secretary, attests is unusually good.

A. Stevens Halsted, Jr., our new president, is not unaccustomed to top spots and we predict he will administer the affairs of our association with efficiency, tinctured with gusto and good humor. Having been fortunate in working with Steve off and on over the years, we can testify that he is a man of wide-ranging interests, with a mind crammed full of fascinating information, much of it authentic.

If we had to sum Steve up in one simple sentence, it would go much like this: If you were destined to spend the rest of your life on a desert island and were allowed to choose a very few companions, Steve is one you would surely include, if you knew him as well as we do. In partial proof of which we assure you that he will relish rather than resent the last four words of the preceding paragraph.

Up from junior vice president to senior vice president comes Walter Ely, that extraordinarily effective exponent of extemporaneous eloquence from east of the Rio Grande. Walter, in less time than it requires to take a case to the Supreme Court and back, emerged as a leader of the California bar. And, having watched him in operation on many occasions, both public and private, we are confident that he has not begun to exhaust his momentum.

[1] They are held at noon, usually with an extended agenda, and presiding over them is hardly relaxing. Yet Grant did so week after week, coming directly from the courtroom and returning immediately to it.

Everybody doubtless knows that Maynard Toll, the new junior vice president, presides over the tax department of the O'Melveny one-stop legal shopping center. Perhaps no one other than Maynard knows the number of civic and charitable enterprises in which he has a very helping hand. Everyone who has heard him present an Association budget realizes that he is listening to a man who is at home with facts and figures and who, in addition, has a decent regard for the value of his time and that of others.

With his foot on the first step of the official escalator is Paul R. Hutchinson, our new secretary. His professional competence and personal charm give assurance that our Association will continue to have the strong leadership to which it has become accustomed.

At the traditional dinner given last month by Steve Halsted and the newly elected vice presidents for Grant Cooper, the retiring president, Steve observed that in some circles Paul is referred to as "Honest Hutch." Perhaps it should be explained to the uninitiated that the circles in question refer to five or six fellow practitioners grouped about a table and engaged in an activity which, viewed mechanistically, consists in the repetitive distribution in varying combinations of fifty-two printed documents of identical size, but differing content. And the designation "Honest Hutch" is applied, with affectionate envy, as an inverse tribute to the character of his implied representations with respect to the importance (or unimportance) of the particular group of documents over which he from time to time exercises dominion.

Except in the context just mentioned, "Honest Hutch" is as forthright as they come. There is no dodging of issues with him, or any dou' about his position on them.

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One Thing Leads to Another Department

It would be gross error if we ga the impression that the Februa meeting of the Association was co fined to the changing of the guai Far from it. That ceremony was ca ried off with commendable dispat which allowed the speaker his fi time and permitted adjournment the usual hour.

The program committee came u with a gem. The talk by Dr. Frank C. Baxter of U.S.C. on "The Com placent American" was entertainin informative, provocative. We have never seen one of our speakers hold his audience more closely or be applauded by it more appreciatively.

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And Another

Come to think about it, all things considered, the Program Committe did a pretty good job during the past year. The January meeting, when Herm Selvin and Ray Stanbury gave us the pros and cons of dissenting opinions, and some of the others we have had, should prove to succeeding committees that some of our best luncheon attractions are right in our own membership.

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A Slow Reader

A campaign was recently conducted in Benton, **Illinois**, for the return of overdue books to the City Library. The volume turned in which was longest overdue was found in the attic of one of the members of the Library Board. It had been checked out in 1879. Fines were suspended during the drive. But for that a fine of $2,995 would have been owed on the book.